

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - x  
GARY ALBERT EWING, :  
Petitioner, :  
v. : No. 01-6978  
CALIFORNIA :  
- - - - - x

Washington, D. C.  
Tuesday, November 5, 2002

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:09 a.m.

APPEARANCES:

QUIN DENVIR, ESQ., Federal Defender, Sacramento,  
California; on behalf of the Petitioner.

DONALD E. DE NICOLA, ESQ., Deputy Attorney  
General, Los Angeles, California; on behalf  
of the Respondent.

MICHAEL CHERTOFF, ESQ., Assistant Attorney  
General, Department of Justice, Washington,  
D. C., for United States, as amicus curiae,  
supporting the Respondent.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
QUIN DENVIR, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
DONALD E. DE NICOLA, ESQ.	
On behalf of the Respondent	31
ORAL ARGUMENT OF	
MICHAEL CHERTOFF, ESQ.	
In support of the Respondent	48
REBUTTAL ARGUMENT OF	
QUIN DENVIR, ESQ.	
On behalf of the Petitioner	56

1 P R O C E E D I N G S

2 [ 10: 09 a. m. ]

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now on number 01-6978, Gary Albert Ewing versus  
5 California.

6 Mr. Denvir.

7 ORAL ARGUMENT OF QUIN DENVIR

8 ON BEHALF OF THE PETITIONER

9 MR. DENVIR: Mr. Chief Justice, and may it  
10 please the Court: In March 2000, Gary Ewing walked into a  
11 Los Angeles pro shop, took three golf clubs, stuck them  
12 down the pants legs, and walked out. He was quickly  
13 apprehended for that crime. For that crime --

14 QUESTION: What was the value of the golf clubs?

15 MR. DENVIR: Because the value of the golf clubs  
16 was approximately \$1200, it was grand theft under  
17 California law.

18 For grand theft, as a general matter, California  
19 provides a maximum sentence of three years. It also --  
20 because Mr. Ewing had served a prior prison sentence, he  
21 would be subject to a recidivism enhancement of one year,  
22 so the maximum sentence that he would have faced under  
23 California law, but for the so-called "three-strikes law,"  
24 would have been four years in prison, which could have  
25 been reduced by one-half by his conduct in prison and his

1 work in prison. However, because Mr. Ewing had a prior  
2 conviction for first-degree burglary, which has been  
3 classified as a serious felony by California, and for  
4 robbery, which has been classified as a violent felony by  
5 California --

6 QUESTION: Was it armed robbery?

7 MR. DENVIR: He was armed with a knife at that  
8 time.

9 And because of those two convictions, he came  
10 under the California "three strikes and you're out" law.  
11 And as a result of that, he received a sentence of life  
12 imprisonment and with a -- with an added bar that he could  
13 not even be considered for parole for 25 years.

14 QUESTION: Would it be fair to add that another  
15 reason for the sentence was that the judge did not  
16 disregard the priors, and that was because the judge had  
17 the record in front of him and the record showed other --  
18 a history of other offenses? Would that be a fair  
19 statement?

20 MR. DENVIR: It is correct, Your Honor. It --  
21 the judge did have discretion to strike the priors or to  
22 reduce this wobbler offense to a misdemeanor. She  
23 declined to do so, partly on the basis of his prior  
24 record. His prior record were all misdemeanor convictions  
25 prior to that time. But --

1 QUESTION: They were all misdemeanors?

2 MR. DENVIR: Yes, Your Honor. All his -- he  
3 had -- the prior convictions that he had were felonies  
4 were four felonies, all occurred within one year, in  
5 19-- in one month, in 1993. There were three first-  
6 degree burglary convictions, and then there was one  
7 robbery conviction. He had other --

8 QUESTION: Well, now, those surely are not  
9 misdemeanors.

10 MR. DENVIR: No, Your Honor. I was -- I thought  
11 Justice Kennedy's question was directed not to the -- what  
12 they call the "strike priors," but to the fact that he did  
13 have other --

14 QUESTION: Oh, other than --

15 MR. DENVIR: -- previous crimes that were  
16 misdemeanors.

17 QUESTION: -- other than the burglaries.

18 MR. DENVIR: I think that's -- the sentencing  
19 judge relied on that, to some degree, in denying him any  
20 discretionary --

21 QUESTION: Now --

22 MR. DENVIR: -- relief.

23 QUESTION: -- it actually went back to 1984,  
24 didn't it, with grand theft in '84, grand theft in '88?

25 MR. DENVIR: Your Honor, the grand theft

1 actually was a misdemeanor, as we've shown in the appendix  
2 to our reply brief. There was -- there was a  
3 misconception that that was a felony. And in fact, it was  
4 a misdemeanor in Ohio, the first --

5 QUESTION: That was the Ohio offense.

6 MR. DENVIR: I --

7 QUESTION: The --

8 MR. DENVIR: I'm sorry.

9 QUESTION: -- the one that was alleged to be a  
10 felony, I think, in the government's brief --

11 MR. DENVIR: Is in --

12 QUESTION: -- I think that it was only a  
13 misdemeanor.

14 MR. DENVIR: In fact, we've attached the  
15 governing court records as an appendix to our reply brief  
16 that shows it was a misdemeanor.

17 QUESTION: How many -- how many convictions in  
18 all, felonies plus misdemeanors?

19 MR. DENVIR: Your Honor, I believe that he had  
20 the four -- the four prior convictions -- the strike  
21 convictions, the felonies, and I think he had another nine  
22 misdemeanors, and then this present offense. I think  
23 that's the --

24 QUESTION: And the purpose of the three-strikes  
25 law, as I understand it, is to take off of the streets

1     that very small proportion of people who commit an  
2     enormously high proportion of crimes. I forget what the  
3     statistics are, but it's something like, you know, of  
4     those convicted, 20 percent commit 85 percent of the  
5     crimes. It sounds to me like your client is a very good  
6     candidate for that law.

7             MR. DENVIR: We got -- we got --

8             QUESTION: I mean, if that's a reasonable law.  
9     It seems to me this is precisely the kind of person you  
10    want to get off the streets. He's obviously going to do  
11    it again.

12            MR. DENVIR: Your Honor, we believe that the  
13    law, in itself, is not unreasonable and it could result in  
14    a proportionate sentence. It did not in this case.

15            Under this court's decision in Solem  
16    versus Helm, the Court has said that you can look to the  
17    prior record as relevant to the sentencing decision  
18    because it aggravates the present crime, but the focus  
19    must remain on the present crime.

20            QUESTION: Well, Solem stands with Rummel and  
21    with Harmelin. They're really three different points, and  
22    Solem is probably the case that favors you most. But  
23    certainly Rummel is good law, and Harmelin is good law.  
24    And I think those cases don't favor you.

25            MR. DENVIR: Well, Your Honor, I believe that

1 Rummel -- the Court said in Solem -- the majority opinion  
2 said that Rummel would be controlling only in a similar  
3 factual situation. We do not believe we have that here.  
4 And as far as Harmelin was concerned, the basic principles  
5 of Solem were reaffirmed by seven justices in Harmelin  
6 and, we believe, when applied here, will show that this is  
7 a grossly disproportionate sentence.

8 QUESTION: Mr. Denvir, would you clarify whether  
9 your challenge is strictly as applied? Because some of  
10 the -- some of the points that you make seem to be going  
11 to the statute wholesale. So, for example, you talk about  
12 it -- the statute's infirm, because it has no washout for  
13 aging offenses, but there was no such offense at stake  
14 here. The strikes were all rather recent.

15 MR. DENVIR: That's correct, Your Honor.

16 And --

17 QUESTION: So --

18 MR. DENVIR: -- and to answer your question, we  
19 are challenging only the sentence that Mr. Ewing received  
20 for the crime that he committed, that he was sentenced at.  
21 There's much discussion on both sides of -- as -- I -- as  
22 the background of the three-strikes law. We have no doubt  
23 the three-strikes law could result in a -- in a  
24 constitutional sentence. It did not, in this case. So  
25 however the scheme is that reached this sentence, this



1 life sentence for stealing three golf clubs, that sentence  
2 is -- falls under the Eighth Amendment, in our view.

3 QUESTION: But we -- so we should leave out  
4 things like no washout, that someone who never served any  
5 time would subject to the three strikes --

6 MR. DENVIR: I think that's correct, Your Honor,  
7 that they don't play into this case. And I think that --  
8 as I said, that the three-strikes law is merely -- it's  
9 the process that produced an unconstitutional sentence.  
10 It could have been produced by a different sentencing  
11 scheme, also.

12 QUESTION: Well, when we're examining the  
13 constitutionality of the three-strikes law, as applied to  
14 this sentence, we should take into account, should we not,  
15 the purposes of the California law, which was to have a  
16 law which was -- gave simple, clear notice of the three-  
17 strikes policy? And if you want us to take case-by-case,  
18 then that whole policy is undercut, it seems to me.

19 MR. DENVIR: Well, Your Honor, I don't -- I  
20 don't think that's true. In *Solem v. Helm*, the Court made  
21 very clear that it was looking only to the sentence that  
22 was imposed on Mr. Helm

23 QUESTION: Yeah, I was going to ask you about  
24 that, because you had said that the principal focus has to  
25 be on this sentence. I'm just not sure what your

1 authority for that is when we have a recidivist scheme of  
2 this kind.

3 MR. DENVIR: Well, Your Honor, the -- in  
4 Solem versus Helm, the Court, of course, had a recidivist  
5 scheme. The focus there was on number of prior offenses,  
6 as opposed to the nature of the prior offenses. The Court  
7 said that the defendant, under double-jeopardy principles,  
8 cannot be punished for those prior crimes; however, they  
9 are relevant to the -- to the sentence imposed for the  
10 present crime. And the -- and the reason they are  
11 relative -- and the Court said this best in  
12 Gryger versus Burke -- is what they -- what they -- what  
13 they authorize is a, quote, "stiffened penalty for the  
14 latest crime, which is considered to be an aggravated  
15 offense because of repetitive one." That's at page 8 in  
16 our reply brief.

17 But what Solem v. Helm made very clear is,  
18 although the prior crimes are relevant, the focus must  
19 remain, when judging proportionality or gross  
20 disproportionality, on what this -- what this defendant  
21 did at this time, what he is being sentenced for at this  
22 time.

23 QUESTION: I'm just not sure how that works.  
24 What am I supposed to do with recidivism as a factor in  
25 analyzing this sentence?

1                   MR. DENVIR: Your Honor --

2                   QUESTION: Give it some weight, but not  
3 controlling weight, or something like that?

4                   MR. DENVIR: -- I think that what the Court can  
5 say is that his prior crimes are relevant, in the sense  
6 that they make this crime a more aggravated crime than a  
7 crime committed by a first offender --

8                   QUESTION: Well --

9                   MR. DENVIR: -- and that there can be a  
10 reasonable enhancement for that. But in this case, he has  
11 been sentenced to -- he has -- his sentence has gone from  
12 a maximum of three years for a first offender to life, all  
13 based on the recidivism

14                  QUESTION: Well, why --

15                  MR. DENVIR: At that point --

16                  QUESTION: -- why can't the State say that --  
17 where a person has a string of convictions like this man  
18 has, that it's time to get him off the street, as Justice  
19 Scalia says, that he simply cannot conform to the law?

20                  MR. DENVIR: Your Honor, if he, in fact,  
21 committed a crime at this point that was a serious or a  
22 violent crime, they may have a basis, but what the Court  
23 has said very clearly is that --

24                  QUESTION: What --

25                  MR. DENVIR: -- is the focus remains on this,

1 because otherwise --

2 QUESTION: What --

3 MR. DENVIR: -- he's being punished for the  
4 prior crimes. I'm sorry, Your Honor.

5 QUESTION: Well, what's the reason for saying  
6 that though -- that you can only -- that the focus remains  
7 on this crime, but others are relevant? I mean, that  
8 really is kind of meaningless, it seems to me.

9 MR. DENVIR: Well, I don't think so, Your Honor,  
10 because, as I say, what the Court has said over the years  
11 is that the important part about the prior crimes is that  
12 it shows that this is a repeat offense. And the fact that  
13 he has committed offenses in a row makes this particular  
14 offense worse. The fact that he has committed worse  
15 offenses in the past does not aggravate this crime. I --  
16 this is -- this still remains shoplifting three golf  
17 clubs, regardless if he had been a triple murderer or  
18 anything else, and that's what he's being punished for.  
19 Because if he's being punished because of those prior  
20 crimes, their nature, there's really serious double  
21 jeopardy --

22 QUESTION: What do you think would be enough?  
23 Thirty years? Would you like 30 years for walking off  
24 with three golf clubs?

25 MR. DENVIR: Your Honor, I -- the -- if you --

1 if you look at our --

2 QUESTION: I mean, if you're going to look on it  
3 as just stealing three golf clubs, and cast a blind eye to  
4 his long record of criminal activity, I don't know why you  
5 can give him any more than, you know, a couple of years.

6 MR. DENVIR: Well, Your Honor, if you look to  
7 our -- to the comparison with other jurisdictions -- and I  
8 just don't think this has been highlighted in our brief --  
9 there are only -- there are only five jurisdictions that  
10 would have allowed a life sentence. There's only one  
11 additional jurisdiction, Montana, that would have allowed  
12 a term of years as great as the minimum sentence here, and  
13 that's -- Montana allows -- is five to a hundred years.  
14 And most states allow for either grand theft or recidivist  
15 grand theft --

16 QUESTION: But we said --

17 MR. DENVIR: -- ten years at the most.

18 QUESTION: -- we said in Rummel, there's always  
19 going to be some state that punishes more harshly than  
20 others. And certainly it was not intimated that that  
21 state, therefore, would -- it was cruel and unusual.

22 MR. DENVIR: No, that's correct, Your Honor. In  
23 Solem v. Helm, the Court noted that he could -- that  
24 Mr. Helm could have received a comparable sentence in one  
25 other state, and nevertheless held that it fell under the

1 Eighth Amendment.

2 QUESTION: Well, just help us one more time.  
3 The prior history is relevant, but then how relevant?

4 MR. DENVIR: Well, Your --

5 QUESTION: You say the principal focus has to be  
6 on the three golf clubs, like we're some judges out of  
7 Victor Hugo or something and that's all we have to focus  
8 on. But this -- there's a -- there's a long recidivism  
9 component here, and that's the whole purpose of the  
10 California law that you're asking us to ignore, it seems  
11 to me.

12 MR. DENVIR: Your Honor, and -- what I'm saying  
13 is -- I'm going back to what the Court said in Solem v.  
14 Helm in its analysis, which I think is controlling here.  
15 It made -- it made the point that the -- the prior  
16 convictions -- he cannot be punished for those, but they  
17 do aggravate this present crime that he's being punished  
18 for. And the way they aggravate it is that -- is that  
19 this shows that it's a repetitive offense.

20 Now, he can have a reasonable enhancement of the  
21 normal penalty for grand theft based on the repetition  
22 aspect of it, but at some point it becomes unreasonable.  
23 And it becomes unreasonable if you go from three years to  
24 life based on his prior crimes. At that --

25 QUESTION: Why isn't it reasonable to say if he

1 commits another felony -- he's committed, you know, three  
2 already and nine other convictions -- "One more felony,"  
3 California tells him, "and you go away for life." Why  
4 isn't that reasonable? And this -- and this was a felony.

5 MR. DENVIR: Because of the nature of the crime  
6 that he committed, which is stealing three golf clubs, a  
7 crime that is not deemed either serious or violent under  
8 California law.

9 QUESTION: But is a felony under California law.

10 MR. DENVIR: It is a felony. It's actually a  
11 wobbler and could be charged either way.

12 QUESTION: Why --

13 MR. DENVIR: But in this case, it's a felony.

14 QUESTION: Why can't California decide that  
15 enough is enough, that someone with a long string like  
16 this simply deserves to be put away?

17 MR. DENVIR: Well, Your Honor, if that were  
18 true, then there would be no limiting principle on  
19 recidivist laws under the Eighth Amendment. It would --  
20 at that point, you could say the mere fact that he broke  
21 any law -- if he broke a traffic offense -- a petty  
22 offense would show that he couldn't follow the law and  
23 could get a life sentence.

24 QUESTION: Oh, I'd be with you there, if it was  
25 a misdemeanor or, you know, some -- but this is a felony

1 under California law.

2 MR. DENVIR: It is a felony, and it's one of the  
3 least grave felonies in California.

4 QUESTION: But we have given -- we've said, at  
5 least, here, that we are going to give great latitude to  
6 state legislatures in determining how many years to give,  
7 and how to categorize an offense.

8 Why don't -- why don't we look to the Harmelin  
9 case for the standards, rather than Solem? Harmelin came  
10 later.

11 MR. DENVIR: Well, Your Honor, I think you do,  
12 because, as I understand the Harmelin case, if you take  
13 the dissent and the plurality, they both agreed on the  
14 basic principle here, which is that there cannot be gross  
15 disproportion between the offense and the sentence. And  
16 the reason I go back to Solem versus Helm is that it was a  
17 recidivist case and there was some further information.

18 I don't -- as I read the Court's opinion, at  
19 least the plurality opinion, in Harmelin, the big change  
20 was that you would -- you would not look automatically to  
21 intra-jurisdictional or inter-jurisdictional comparisons.  
22 You would first have to find an inference of gross  
23 disproportionality before you'd go to the second -- the  
24 other two steps. That's what I understood to be the  
25 major -- the major refinement of Solem v. Helm that was in



1 the plurality opinion.

2 QUESTION: I'm slightly stuck on this, because  
3 I -- I'd like -- there is some relevant information that I  
4 can't get a hold of, and you may some in your experience,  
5 but it isn't in the brief.

6 Imagine -- let's take the set of people who have  
7 committed at least two serious crimes or more, maybe 50  
8 serious crimes. They're very serious criminals. And  
9 they're warned, "If you do anything again, you've had it."  
10 So think of that set of people.

11 Now, I would like to know, in light of that set  
12 of people, now one of the members of that set commits a  
13 crime equal to stealing \$1200 -- whether they steal \$1200  
14 or equal to that; that's a very subjective judgment --  
15 what's the longest sentence such a person has ever  
16 actually served? Here, they are going to 25 years, real  
17 years.

18 And the second question I'd like to know is,  
19 What is the least bad crime that such a person ever  
20 committed who did serve 25 real years?

21 MR. DENVIR: Well, Your Honor --

22 QUESTION: I'd like to know both of those  
23 things. And, obviously, they're find-outable.

24 MR. DENVIR: I -- let me see if I can answer  
25 your question. As far as under the three-strikes law,

1     there is -- because it sets this absolute minimum of 25  
2     years -- it's a life sentence, but it adds a kicker to it  
3     which says, unlike other life sentences, you have to wait  
4     at least 25 years before you can even be considered. So  
5     we -- since this law was passed in 1994, we have no  
6     experience with this law.

7             QUESTION: Obviously, I don't want  
8     experience --

9             MR. DENVIR: Right.

10            QUESTION: -- under this law. That would be  
11     circular.

12            MR. DENVIR: Well, Your Honor --

13            QUESTION: What I'm looking for is, in the  
14     absence of this law --

15            MR. DENVIR: Oh, I'm sorry. I understand --

16            QUESTION: -- in the absence of this law, what  
17     is the longest sentence a person like yours -- and I'm  
18     defining "a person like yours" to be a really bad criminal  
19     who now will commit another crime equal to or the same as  
20     stealing \$1200. And there's loads of records -- I mean,  
21     in the California Adult Authority before this law was  
22     passed, et cetera.

23            And the second question is, What is the least  
24     bad thing such a person who really served 25 years did?

25            MR. DENVIR: Your --

1                   QUESTION: That -- those are empirical  
2 questions, and you're talking about this being unusual.  
3 I don't know if it's unusual unless I know what happened  
4 to other people.

5                   MR. DENVIR: Well, Your Honor, I don't -- I --  
6 there's nothing in the record that would answer that, but  
7 let me see if I can answer it in a different way. But for  
8 the three-strike law, Mr. Ewing, with his record, could  
9 receive no more than four years. Now, there are other  
10 recidivist laws in California besides the three-strike  
11 law.

12                  QUESTION: Under the California Adult Authority,  
13 which was only the law in California for 70 years, people  
14 could receive very, very, very long sentences.

15                  MR. DENVIR: They could, Your Honor, and  
16 California is --

17                  QUESTION: And -- not this long for this thing,  
18 but -- but -- but --

19                  MR. DENVIR: I think that's right. I think the  
20 long sentence -- the -- California substituted determinate  
21 sentencing law for indeterminate in 1977, and -- but under  
22 the old indeterminate sentencing law, my clear  
23 recollection is that those long, indeterminate sentences  
24 were always triggered by serious or violent felonies, and  
25 that is something that --

1           QUESTION: No, they -- I've looked it up,  
2 actually --

3           MR. DENVIR: No?

4           QUESTION: -- and you're quite right that this  
5 is not as -- you couldn't get this long a sentence, but  
6 you could get a pretty long one for being a third offender  
7 and committing a property crime.

8           MR. DENVIR: And --

9           QUESTION: But I -- that doesn't tell us how  
10 long the people actually served.

11          MR. DENVIR: Well, Your Honor, if you look for  
12 the question of parole in California, which the -- which  
13 the State suggests is -- saves his life sentence, the  
14 Court looked at this in 1995 in the case California  
15 Department of Corrections versus Morales. And what the  
16 Court said at that time was that 90 percent of all  
17 defendants who came up for their first parole hearing were  
18 found unsuitable for parole and that 85 percent were found  
19 unsuitable at subsequent hearings. Now, that has not  
20 improved any, because, as you'll see in the amicus brief  
21 of Families Against Mandatory Minimums, at page 18, as of  
22 2000, the Board of Prison Terms, which is the -- which is  
23 the parole authority -- their official records show that  
24 they only recommended parole in 1 percent of the 2000  
25 cases that came before them with a life sentence.

1                   QUESTION: Mr. Denvir, can't the people of --  
2 this thing, by the way, was not adopted by the  
3 legislature, was it? It was adopted by plebiscite, of the  
4 people of California --

5                   MR. DENVIR: By both, Your Honor.

6                   QUESTION: By both.

7                   MR. DENVIR: Both by legislature and by --

8                   QUESTION: By plebiscite. So the people of  
9 California decided, "We want to be tougher." Why do we  
10 have to be bound by whatever the more permissive scheme  
11 was earlier? The people of California knew that scheme,  
12 and they decided, "This is no good. We still have too  
13 much crime. We're not punishing people enough, or we're  
14 not keeping them -- keeping them incarcerated long  
15 enough." Why do we have to be bound by whatever the  
16 previous record was?

17                  MR. DENVIR: Well --

18                  QUESTION: It seems to me the question before us  
19 is, Is it unreasonable to put away somebody who has this  
20 record?

21                  MR. DENVIR: Your Honor, first of all, as to the  
22 question of initiative versus legislation, it is my  
23 understanding that the Court, in other areas, has said  
24 that there's no greater deference given to one than the  
25 other.

1           But the other question is, there's no doubt that  
2   some deference has to be paid by this Court to legislative  
3   judgments or initiative judgments in the questions of  
4   punishment and in dealing with recidivists. The Court has  
5   made that very clear. But it is that deference that has  
6   led to the Court setting a very forgiving standard. The  
7   Court said that it would not require, in this area, or as  
8   excessive fines, strict proportionality between the crime  
9   being punished and the sentence. It has said it was only  
10   when there was a gross disproportion, and that's a very  
11   deferential standard. That is a standard that allows the  
12   legislature to make many reasonable judgments, but says  
13   that --

14           QUESTION: So how do you decide --

15           MR. DENVIR: -- some judgments are unreasonable.

16           QUESTION: -- how much is too much?

17           MR. DENVIR: Well, Your Honor --

18           QUESTION: What's the --

19           MR. DENVIR: -- life imprisonment for -- for the  
20   crime of stealing three golf clubs, we believe, is cruel  
21   and unusual punishment.

22           QUESTION: It's not life imprisonment.

23           QUESTION: But we're just doing --

24           QUESTION: It's 25 years.

25           MR. DENVIR: Your Honor --

1                   QUESTION: It's 25 years that he'll really  
2     serve. We know that. As far as -- what happens after  
3     those 25 years is a matter of parole or a decision by  
4     other people.

5                   MR. DENVIR: Your Honor, the sentence that he's  
6     been given is life in prison. He's been consigned to die  
7     in prison unless some administrative agency determines to  
8     let him out. And as I've just quoted you --

9                   QUESTION: But I mean, parole, in all the cases  
10    you're citing, is relevant, so you can describe it as you  
11    want. We both know what the facts are. The facts are he  
12    has to be in jail for at least 25 years, and then he might  
13    be paroled.

14                  MR. DENVIR: And he might be, but on -- there is  
15    no -- there is nothing in this record that would suggest  
16    he has a reasonable expectation in that regard. In  
17    fact -- in fact, what's before the Court would suggest  
18    that there is not a reasonable expectation, particularly  
19    if the animus that drives -- that drove the passage of  
20    this law continues for 25 years and they still think,  
21    "Well, gee, if they committed these prior crimes, they  
22    ought to be locked up for life, because they may commit  
23    other crimes."

24                  QUESTION: In the statistics that you were  
25    quoting, though, those were not three-strikes cases.

1           MR. DENVIR: Those are not three-strikes cases.

2           QUESTION: Those are cases where people might  
3 have gotten reduced time for good behavior --

4           MR. DENVIR: That's correct.

5           QUESTION: -- none of which is -- and one  
6 question I wanted to ask you, In view of the infirmities  
7 of Mr. Ewing -- is he still alive?

8           MR. DENVIR: He is alive, Your Honor. He is --

9           QUESTION: Counselor --

10          MR. DENVIR: -- he's lost -- he's aged and has  
11 lost eyesight in one eye as a result, but he's still alive  
12 at this point --

13          QUESTION: How old was he at the time of  
14 sentence?

15          MR. DENVIR: He was 38 years old. He's 40 years  
16 old now. So --

17          QUESTION: Counselor --

18          MR. DENVIR: -- as a practical matter -- I mean,  
19 this -- 25 years is probably a life sentence for him,  
20 unless there's some major medical development that --

21          QUESTION: Mr. Denvir, you conceded a moment ago  
22 that the prior offenses can be considered for purposes of  
23 treating this offense as an aggravated offense, given the  
24 prior record; and yet when you answer -- you've done this  
25 more than once -- when you have answered the question of



1 going to disproportionality, you have said, "It's 25 to  
2 life for stealing three golf clubs."

3 I don't think you can have it both ways. Either  
4 your argument is it's 25 -- the appropriate comparison  
5 is -- or the appropriate characterization is "25 to life  
6 for three golf clubs," in which case you, in effect, are  
7 telling us, "Ignore the priors; they don't aggravate," or  
8 you've got to say, "It's 25 to life for stealing three  
9 golf clubs when you have a prior record" -- whatever it  
10 was, nine prior offenses, including four felonies, in this  
11 case. Which is it? Because I assume it may well affect  
12 the result.

13 MR. DENVIR: Your Honor, I -- if -- I misspoke.  
14 What we say is the focus must be on the present offense.  
15 It is an aggravated offense. He is a repeat --

16 QUESTION: But when you said that --

17 MR. DENVIR: -- a repeat offender. He is a  
18 repeat offender. He is someone who committed this offense  
19 with a prior record of offenses.

20 QUESTION: Is it inconsistent with your  
21 position -- when you say, "The focus must be on this  
22 offense," is it inconsistent with that to say, "This  
23 offense -- is stealing three golf clubs worth \$1200 by  
24 somebody with a prior record of nine offenses"? Is that  
25 consistent with putting the focus on this offense, in the

1 terms that you're using?

2 MR. DENVIR: I think it is, in the sense that it  
3 shows that there has -- there has been some -- there has  
4 been a series of repetition. But what I'm suggesting to  
5 the Court is that regardless of the repetition, the fact  
6 that it's a repetitive offense, if the focus remains on  
7 what he did now, the triggering offense, which, under  
8 *Solem v. Helm*, is the focus, then no matter what he has  
9 done in the past, no matter how much repetition, it is --  
10 it is grossly disproportional to sentence him to a life  
11 sentence. At that point --

12 QUESTION: A hundred prior instances of stealing  
13 three golf clubs would not affect the analysis then on  
14 your view?

15 MR. DENVIR: Your Honor, if there -- if there  
16 were a -- if there were a series of crimes of the same  
17 nature -- for instance, if there --

18 QUESTION: Well, I've just -- I've just given  
19 you one.

20 MR. DENVIR: Yes.

21 QUESTION: A hundred prior -- three golf clubs  
22 every time, a hundred times -- would that justify the  
23 treatment that he has gotten?

24 MR. DENVIR: Your Honor, I think that that  
25 would -- that would show a propensity to steal golf clubs,

1 but, again, I don't believe --

2 QUESTION: I would concede that, but the --

3 (Laughter.)

4 MR. DENVIR: -- I don't believe --

5 QUESTION: Posit further that his score has not  
6 improved.

7 (Laughter.)

8 MR. DENVIR: He shouldn't be penalized for that.  
9 That may be beyond his control.

10 QUESTION: Okay, but if we -- if we've got our  
11 crazy example of a hundred priors exactly like this, and  
12 we follow your verbal criterion at least of focusing on  
13 this event as aggravated, would this be disproportionate,  
14 grossly?

15 MR. DENVIR: I believe that life is, because it  
16 is still -- the crime that has to be punished -- I mean,  
17 and this is what the Court said in Solem v. Helm -- this  
18 is --

19 QUESTION: Well, maybe we were trying --

20 MR. DENVIR: -- you know, in Solem v. Helm --

21 QUESTION: -- maybe we were trying to have it  
22 both ways verbally because we were imprecise. But with  
23 respect, I think that's what you're trying to do. Because  
24 on the one hand, you concede, yes, it may be regarded as an  
25 aggravated offense in light of the priors, and then in the

1 next breath you say, "But the focus has got to be on this  
2 offense. "

3 MR. DENVIR: Your Honor, I -- Your Honor,  
4 there's no doubt that the prior record -- and the Court  
5 has said that is relevant to the punishment for the  
6 present crime, and it does aggravate it. But there are  
7 limits to how aggravated shoplifting three golf clubs can  
8 be, no matter what has happened before --

9 QUESTION: Even with the hundred prior  
10 instances?

11 MR. DENVIR: Your Honor, it's still three --  
12 it's still stealing three golf clubs. It's not robbery,  
13 rape, murder, or something of that nature. I mean, it  
14 is -- it is still there. I mean, the -- to raise your  
15 question, what if someone had a long history of  
16 jay-walking and had seven or ten or a hundred convictions  
17 for jay-walking and jay-walked again? I think the Court  
18 would not say you could get a life sentence for that  
19 just --

20 QUESTION: I don't --

21 MR. DENVIR: -- because it's repetitive.

22 QUESTION: -- I don't think it would. And the  
23 reason it wouldn't is -- I assume you would concede -- is  
24 that jay-walking does not hurt other people the way 100  
25 instances of stealing golf clubs worth \$1200 hurts other

1 people.

2 MR. DENVIR: It hurts in the sense that it's a  
3 property crime and causes --

4 QUESTION: Well, you know, and --

5 MR. DENVIR: -- a loss, that's correct.

6 QUESTION: -- and may lead to something beyond  
7 property crime. Isn't grand larceny much more likely to  
8 result in physical confrontation and --

9 MR. DENVIR: Your Honor, I --

10 QUESTION: -- physical injury than jay-walking?

11 MR. DENVIR: -- Your -- it is -- it is, Your  
12 Honor, and I think --

13 QUESTION: Which is why it's a felony.

14 MR. DENVIR: -- and I think that if there had  
15 been some -- some violence that had actually occurred out  
16 of this, then he undoubtedly would have been punished  
17 under a different statute with higher --

18 QUESTION: It's a serious crime, in part because  
19 of that -- in part because of the risk of physical  
20 confrontation that he poses.

21 MR. DENVIR: But Your Honor, California  
22 determined that when it set the ranges for grand theft --

23 QUESTION: Would you like -- would you like to  
24 reserve time, Mr. Denvir?

25 MR. DENVIR: If the Court has further questions,

1 I'd rather answer the questions --

2 QUESTION: Very well --

3 MR. DENVIR: -- than reserve time.

4 QUESTION: Very well. You asked for it, you --

5 MR. DENVIR: California considered that when  
6 they set the penalties for grand theft. And they set the  
7 penalty as a maximum of three years in prison. If they  
8 set different penalties for grand theft from a person, and  
9 for robbery, there is -- there is -- all those things are  
10 taken into consideration here. And the fact that this  
11 could have eventuated into something else, the fact of the  
12 matter is that it did not. And in fact, if anything,  
13 Mr. Ewing seemed to be doing everything he can to be -- to  
14 get out of there undetected, if that -- if you look at the  
15 facts of this crime.

16 QUESTION: I'm curious about one thing. Was he  
17 really a very tall man, or were these irons rather than  
18 wood?

19 (Laughter.)

20 MR. DENVIR: Your Honor, to tell you the truth,  
21 I have no idea how he could have done that. It seems to  
22 me a miracle that he could have -- actually got out the  
23 door, but he apparently did. He's not a very tall man, as  
24 I recall.

25 QUESTION: It is a good thing that walking is

1 not an essential part of golf, because otherwise walking  
2 with those --

3 MR. DENVIR: I think --

4 QUESTION: -- golf clubs in his pants would have  
5 been very difficult.

6 (Laughter.)

7 MR. DENVIR: I think he was planning on removing  
8 them before he used them, I take it --

9 QUESTION: He took a golf cart out to the car.

10 (Laughter.)

11 MR. DENVIR: Your Honor, I would reserve any  
12 additional time, unless there's additional questions.

13 QUESTION: Very well, Mr. Denvir.

14 MR. DENVIR: Thank you.

15 QUESTION: Mr. De Nicola, we'll hear from you.

16 ORAL ARGUMENT OF DONALD E. DE NICOLA

17 ON BEHALF OF THE RESPONDENT

18 MR. DE NICOLA: Mr. Chief Justice, and may it  
19 please the Court: First, I think, in answer to Justice  
20 Breyer's question, I don't know what the statistics are  
21 under the old indeterminate sentencing law that was in  
22 effect in California until 1976. But in a way, I think  
23 the -- Your Honor's question triggers an issue that I  
24 think is central here.

25 The ISL, the old California law, was premised

1 very explicitly on a penological theory that emphasized  
2 rehabilitation of the offender. I think the question  
3 that's raised in this case, and it's a question that's  
4 particularly apt in light of the Harmelin opinion, is,  
5 When can a state decide that they're going to move away  
6 from a more lenient policy of rehabilitation or extending  
7 leniency to a first-time offender, and move toward a  
8 policy, a tougher policy, of incapacitation?

9 QUESTION: So, tell me, am I fair to say assume  
10 there never, in the history of the United States, has been  
11 a person who -- of the set -- I'm only -- I don't want to  
12 be pejorative; I want to characterize it your way, and  
13 I'll characterize it as taking the set of very serious  
14 criminals with very serious records, and a person in that  
15 set commits another crime, and the other crime is  
16 approximately theft of \$1200 -- and am I fair in saying  
17 there hasn't been, ever, a sentence in the history of the  
18 United States in the last hundred years anywhere close to  
19 this one? And I base that on my knowledge -- which you  
20 could get; it's public -- of 35,000 real cases in the  
21 federal system where to get a sentence like this one for a  
22 prior offender, you had to -- you have to now, you know,  
23 hijack an airplane, commit murder, something really  
24 serious beyond belief compared to this, and that the worst  
25 sentence you could get for something like this is about



1 four, five years.

2 And then I look to the California Adult  
3 Authority, and I see, under that sentencing, nobody could  
4 have gotten more than ten real years, and, indeed, the  
5 average was somewhere around five. And you have all those  
6 records, and you have come up with nothing in your brief.  
7 And therefore, can I say -- my assumption is, this is by  
8 an order or factor of two or three times higher than  
9 anyone ever was sentenced before in the United States for  
10 such a thing?

11 You see, I'm making a very extreme statement  
12 empirically, and I want to know what the response is to my  
13 statement, and I want to know why I shouldn't hold you to  
14 my statement since you have the information, and why I  
15 shouldn't say that's just way too much.

16 MR. DE NICOLA: Well, again, Your Honor, I --  
17 the -- my answer is that I do not know what those records  
18 would have shown.

19 QUESTION: I guess he shouldn't hold you to it,  
20 since you don't have the burden of persuasion here, do  
21 you? I thought you're defending a -- a decision below.

22 MR. DE NICOLA: Yes, and I did interpret the  
23 issue to be a proportionality issue rather than an  
24 unusualness issue. But I do -- something in the recesses  
25 of my mind tells me that we had a three-time loser statute

1 in California, and I think that put people away for life  
2 without parole.

3 QUESTION: Well, all right, how do we decide --  
4 how do we decide if you say, of this serious set of  
5 criminals, you go to jail for life if you jay-walk -- I  
6 mean, the next time. Is that -- is that disproportionate?  
7 How am I supposed to say what is or was -- is not if I  
8 don't look to the empirical facts? And I'm not holding  
9 you to present empirical facts. I'm just saying, Why  
10 shouldn't I decide on the basis of empirical fact that is  
11 available?

12 MR. DE NICOLA: Well, in our view, the most  
13 prominent, kind of, objective factor that this Court could  
14 look to in weighing this sentence is what the legislature  
15 has said are felonies. What California has done in this  
16 case is, they've narrowed their target to a subclass of  
17 felons who have committed what the legislature has deemed  
18 to be -- and I think what, on the face of it, can  
19 reasonably interpreted as being -- serious or violent  
20 crimes.

21 QUESTION: What's the limit for being -- what is  
22 dividing line between grand theft and petty theft in  
23 California?

24 MR. DE NICOLA: Four hundred dollars, Your  
25 Honor.

1           QUESTION: When I went to law school, it was  
2 \$100, except if it was citrus that you stole, it was \$50.

3           (Laughter.)

4           MR. DE NICOLA: Now it's \$100 if it's citrus.

5           (Laughter.)

6           MR. DE NICOLA: But once there is that predicate  
7 of serious or violent felonies set in place, then what the  
8 three-strikes law does is, I think, reasonably moves  
9 toward a policy of incapacitation upon the commission of,  
10 not just any new crime, not a misdemeanor or an  
11 infraction, but a new crime that the legislature has --

12          QUESTION: One of the things that puzzles me  
13 about the statute -- maybe you can enlighten me -- I  
14 thought that if there were two priors that were violent  
15 but not related to property, such as murder and rape, that  
16 the third related to property wouldn't trigger the  
17 statute.

18          MR. DE NICOLA: No, Your Honor. The way the  
19 statute is written is that if the prior felonies meet the  
20 statutory definition of being serious or violent -- if you  
21 have two of those, then any new felony triggers the three-  
22 strike sentence.

23          QUESTION: Even if you -- if you had, say, a  
24 murder conviction and a rape conviction and then you  
25 committed a wobbler that was a property crime? Would the

1 statute treat that as a third strike?

2 MR. DE NICOLA: Yes, because wobblers are  
3 felonies, by definition, in California, and any felony  
4 qualifies.

5 QUESTION: Regardless of the character of the  
6 first two strikes.

7 MR. DE NICOLA: As long as the first two strikes  
8 meet the level of being serious or violent, which --

9 QUESTION: I see. So -- and there's no  
10 requirement that it be related to property. I  
11 misunderstood.

12 MR. DE NICOLA: No, Your Honor.

13 QUESTION: All right.

14 QUESTION: Also, I don't know how to work with  
15 felony and misdemeanor, because, across the nation, my  
16 impression is that those are classified in very different  
17 ways, and they are classified sometimes according to the  
18 prison that you serve in, as in Massachusetts, and  
19 sometimes you can find a felony that, in ordinary common  
20 sense, is a lot less serious than certain misdemeanors.  
21 That's why I'm very pushed to know what to work with  
22 unless you work with empirical fact.

23 MR. DE NICOLA: Well, we -- in California, the  
24 felony is defined by the -- not just the locus of where  
25 the term will be served, but also by the length. It's

1 more than a year. And we think that that's a traditional  
2 line of demarcation between offenses that, over the course  
3 of time, society deems to be of elevated seriousness.

4 QUESTION: I think some of our constitutional  
5 jurisprudence makes it -- makes -- turns upon the  
6 distinction between felonies and misdemeanors, doesn't it?

7 MR. DE NICOLA: Yes, Your Honor, I think that is  
8 so, and there are political restraints on the legislature  
9 in enacting laws in general applicability. There are  
10 certainly economic restraints on a legislature in deciding  
11 to set a punishment scheme that provides for long terms of  
12 imprisonment. That's costly. And that to -- for a court  
13 to second-guess that, comes, we think, perilously close to  
14 the court suggesting that the legislature can, in some  
15 instances, not declare a certain crime to be a felony, but  
16 must declare it to be a misdemeanor, and we don't think  
17 there's anything in the Court's jurisprudence that  
18 would -- that would support that type of an intrusion.

19 QUESTION: Mr. De Nicola, there's a lot of  
20 discretion built into this scheme. It comes across as  
21 three strikes and you're out, and that's it; but it's not.  
22 There's discretion in the prosecutor and discretion in the  
23 judge. Are there, in Los Angeles or in California, any  
24 guides to prosecutors in exercising their discretion, say,  
25 whether to treat a wobbler as a misdemeanor or a felony?

1           MR. DE NICOLA: There are no statewide  
2 standards. Each elected district attorney in the various  
3 counties in California has the option of promulgating  
4 guidelines. Some of them have. And the fact of the  
5 matter is some of them -- some of them differ. We think  
6 that's a rather unremarkable event in light of the fact  
7 that prosecutorial discretion is always going to lead to  
8 some sort of different approach depending on local  
9 conditions. But there is not, as far as I know, any  
10 statewide guideline, and certainly nothing that would be  
11 binding on the local prosecutors.

12           QUESTION: The prosecutor can charge something  
13 as a misdemeanor. As far as the striking a strike is  
14 concerned, is that solely for the judge? Or, I suppose,  
15 it depends on what's charged. The prosecutor can decide  
16 not to charge two strikes.

17           MR. DE NICOLA: Yes, the prosecutor, under the  
18 statute, is required to allege the priors, but the  
19 prosecutor may seek dismissal of the prior strikes either  
20 in the furtherance of justice, or because of problems of  
21 proof. But the judge also has authority the strike  
22 strikes, even without the consent of the prosecutor, in  
23 California. And so --

24           QUESTION: And similarly, to reduce a wobbler to  
25 a misdemeanor.

1           MR. DE NICOLA: Yes, the prosecutor, in a way,  
2 has that discretion, because he or she can charge a -- an  
3 alternative felony or misdemeanor as a misdemeanor in the  
4 first place, but even under the three-strikes law, the  
5 trial judge retains the discretion to sentence a -- an  
6 alternative felony misdemeanor as a misdemeanor, and that  
7 would take the case out of the three-strikes scope.

8           QUESTION: May I ask you a question about your  
9 theory of the limits of the constitutional protection  
10 here? Supposing the offense was speeding -- and it can be  
11 dangerous speeding -- and you had a -- you said that --  
12 15 arrests for speeding gives you this very sentence we  
13 got in this case. Would that be permissible, do you  
14 think? Just on the theory that Justice Scalia  
15 has explained -- where this guy is just too dangerous, we  
16 just don't want him on the street anymore, so we'll put  
17 him in jail for life, 25 years without possibility of  
18 parole.

19           MR. DE NICOLA: Well, we think that might  
20 possibly be constitutional, Your Honor. I --

21           QUESTION: Possibly be constitutional or  
22 unconstitutional?

23           MR. DE NICOLA: Might possibly be  
24 constitutional. I think it's more likely that it would  
25 be --

1           QUESTION: Well, why wouldn't it clearly be  
2 constitutional if we're thinking about protecting the  
3 public from repetitive offenders?

4           MR. DE NICOLA: Well, because I think the  
5 limiting principle that we're seeking here, Your Honor, is  
6 one that's premised on the felony classification. If  
7 the --

8           QUESTION: Do you think the statute would have  
9 been unconstitutional if they had said it's a misdemeanor  
10 when it's \$1200 -- if the legislature just, say, called  
11 the three golf clubs for \$1200 by a misdemeanor instead of  
12 by felony, would that change the constitutional analysis?

13          MR. DE NICOLA: It -- I think it would make the  
14 constitutional -- it might change the constitutional  
15 analysis. It might make the result different. I think,  
16 again, once you have the predicate in place of the serious  
17 or violent felonies, then I think the reason you're --

18          QUESTION: But serious or violent -- it really  
19 doesn't have to be violent; it has to be serious. But you  
20 could have had \$1200 thefts, four or five of them, and he  
21 would still qualify, wouldn't he?

22          MR. DE NICOLA: No, Your Honor. If -- the prior  
23 crimes have to qualify as serious or violent under the  
24 definitions of a separate statutory scheme, so they would  
25 not --



1           QUESTION: But are there not serious crimes that  
2 are not violent?

3           MR. DE NICOLA: Yes, I think that's true. There  
4 are serious crimes where no injury is inflicted, but the  
5 crimes, I think, by their nature, tend to be crimes where  
6 the prospect of violence is rather imminent.

7           QUESTION: But they're -- I'm just trying to --  
8 I'm trying to understand the theory. Is violence an  
9 absolute requirement, in your view, in one of the priors?

10          MR. DE NICOLA: No, I think -- I think --

11          QUESTION: Okay. So then we could have  
12 something equivalent -- maybe instead of \$1200, \$2000 or  
13 something. But if you just had five -- or three or four  
14 \$2,000 burglaries, that -- do you -- would that be  
15 permissible to put him in jail on the same sentence that  
16 you have in this case?

17          MR. DE NICOLA: I -- again, Your Honor, I --  
18 it's a -- it's a much tougher call. I think it might be  
19 permissible to do it, provided that the sentence allows  
20 for a possibility of parole, after the --

21          QUESTION: After 25 years.

22          MR. DE NICOLA: Yes. That would distinguish it  
23 from Solem, Your Honor. But nevertheless, here, the  
24 predicate, even though the prior crimes don't necessarily  
25 have to involve the actual infliction of violence, they

1 are crimes that by their nature --

2 QUESTION: But in your view, violence is really  
3 more significant than the number of prior offenses, if I  
4 understand you correctly.

5 MR. DE NICOLA: Well, I think it might be a  
6 sliding scale, but I think violence does play a  
7 significant role and can justify a scheme like this, even  
8 in the absence --

9 QUESTION: Okay.

10 MR. DE NICOLA: -- of a great number of priors.

11 QUESTION: But you -- but I'm not quite sure  
12 what your view would be if there were no violence, but  
13 just seven or eight high-speed offenses, say, speeding, or  
14 \$1200 golf clubs.

15 MR. DE NICOLA: Well, we think a lot would  
16 depend on whether the legislature in the jurisdiction had  
17 determined for -- for -- on an historical basis and for  
18 reasons independent --

19 QUESTION: Well, speeding is dangerous. People  
20 get hurt in automobile accidents. It seems to me it's  
21 exactly the same risk to the public that you have with  
22 this kind of crime.

23 MR. DE NICOLA: But we think -- if the  
24 legislature declares those to be a felony, then I think we  
25 become a lot -- we come a lot closer to --

1           QUESTION: It depends on what the legislature  
2 calls the offense.

3           MR. DE NICOLA: Yes, it does, Your Honor, in a  
4 very significant respect, because what the legislature  
5 calls the offense in connection with it being a  
6 misdemeanor or a felony does reflect, we think, a reliable  
7 longstanding consensus of the -- of the community. And  
8 under the Harmelin principles of deference and reliance  
9 and objective factors, we think that's a prominent  
10 objective factor.

11           QUESTION: On Justice Stevens' hypo, taking it  
12 one step further, I guess we would have to say that if  
13 there were 15 prior speeding offenses, and they had been  
14 classified as felonies in California, that there was no  
15 disproportion between 25-to-life for 15 -- with a  
16 predicate of 15 prior speeding offenses, on the one hand,  
17 and the penalties for torture and murder, on the other  
18 hand. Because I think it's undisputed that the only  
19 standalone penalties that are this great are the penalties  
20 for torture and homicide. That would be rather a stretch,  
21 wouldn't it, regardless of whether the legislature wants  
22 to put a felony label on them or not?

23           MR. DE NICOLA: Well, again, Your Honor --

24           QUESTION: Speeding's important, but --

25           MR. DE NICOLA: Yes.

1 QUESTION: -- I mean, torture and murder?

2 MR. DE NICOLA: I do think that it is a much  
3 tougher case for us, and I'm not at all certain that it  
4 would be constitutional if all of the crimes, the  
5 predicate through the new crime, were simply speeding.  
6 I think --

7 QUESTION: Might it be an abuse of the judge's  
8 discretion not to reduce such a -- if it's a wobbler, in  
9 such a case, or not to strike a strike?

10 MR. DE NICOLA: Well, I don't -- in the  
11 California context, the question would only arise -- well,  
12 I don't think it would arise at all, because you wouldn't  
13 have a speeding -- even as a predicate, any felony-  
14 triggering events, and the speeding wouldn't qualify as a  
15 serious or violent felony under the statute anyway. So  
16 this hypothetical is very far removed from the three-  
17 strikes scheme that California has in place.

18 QUESTION: I would have thought that your  
19 response to Justice Souter would have been that it might  
20 seem disproportionate insofar as the penal goal of  
21 punishment or retribution is concerned, but it depends on  
22 what you want your penal goals to be. California has  
23 decided that disabling the criminal is the most important  
24 thing, and in -- from that point of view, it's not  
25 necessarily disproportionate. The one is disabled as the

1 other.

2 MR. DE NICOLA: Well --

3 QUESTION: I mean, proportionality -- you  
4 necessarily have to look upon what the principal objective  
5 of the punishment is. If the objective of -- if the  
6 objective is retribution, then, sure, I guess it's  
7 disproportionate to execute somebody for killing only one  
8 person, when you do no more than execute somebody for  
9 killing 20 people. But if your purpose is disabling the  
10 criminal, I'm not sure that it -- that the example that  
11 Justice Souter gave is disproportionate.

12 MR. DE NICOLA: Well, again, Your Honor, I  
13 don't -- I don't think I would absolutely concede that it  
14 would be unconstitutional. I'm just saying that --

15 QUESTION: Well, do you adopt Justice Scalia's  
16 analysis? I mean, this came up in the briefs, and this  
17 was an interesting point. Does the State, for purposes of  
18 proportionality analysis, have the option to adopt a  
19 different theory of penalty? And he's given an example.  
20 Do you -- do you adopt that argument here? And do you  
21 think that is a justification that you want to rely on in  
22 this case?

23 MR. DE NICOLA: Yes, we do adopt the theory of  
24 incapacitation, and we do rely on incapacitation as a  
25 theory that justifies the sentence in this case.

1                   QUESTION: All right. Here's the problem that I  
2 have with that, and this is -- this is -- this is what I  
3 wish you would address. If we allow, for purposes of  
4 proportionality or gross disproportionality analysis, this  
5 kind of -- the consideration of varying intentions --  
6 retribution, incapacitation, deterrence, and so on -- and  
7 every time the State gets to a very high offense, the  
8 State says, "Oh, we've changed the theory. We've gone  
9 from deterrence to retribution," it seems to me that it  
10 makes this kind of analysis of comparables -- this  
11 proportionality analysis -- impossible because we no  
12 longer have two comparable entities on either side of our  
13 comparison. What we have is a low sentence on the one  
14 hand for deterrence, and a high sentence for  
15 incapacitation or retribution. We have apples and oranges  
16 instead of oranges and oranges.

17                   So my question is, If we accept the State's  
18 option to say, "We've changed the theory," don't we read  
19 comparability analysis right out of the law? Doesn't it  
20 simply become logically impossible?

21                   MR. DE NICOLA: Well, I think it becomes much  
22 more difficult, but I don't think it necessarily becomes  
23 logically impossible, because I think there is still room  
24 for judicial scrutiny, within the context of the Harmelin  
25 narrow proportionality principle, to take a hard look --

1           QUESTION: But my problem is, I don't know what  
2 we're supposed to -- what we can compare for comparable  
3 examples on proportionality analysis if it can be  
4 fundamentally affected by the State's change of intention  
5 from one theory in one crime, or one set of penalties, to  
6 another theory in another set of penalties. I don't see  
7 what we can compare. We no longer have comparables.

8           MR. DE NICOLA: Well, but I think the Court can  
9 still look at whether the phenomenon of -- as in this  
10 case, of heightened recidivism based on prior violence, or  
11 serious offenses threatening violence and triggered by a  
12 new crime that, say -- that's classified as a felony by  
13 the legislature and that offers a sentence of -- a lengthy  
14 sentence, but that still offers a possibility of  
15 parole --

16           QUESTION: I guess the conclusion that Justice  
17 Souter's questions would lead to is that a State cannot  
18 use any factor except retribution. Or if it uses any  
19 other factor, it does so at the risk of our simply holding  
20 it to be disproportionate.

21           MR. DE NICOLA: Yes, Your Honor --

22           QUESTION: And I don't know that our -- I'm sure  
23 that our cases don't support that.

24           MR. DE NICOLA: It -- and I acknowledge it -- to  
25 Justice Souter, it makes it a very difficult situation.

1 But under Harmelin, those, I think, are penological  
2 objectives that the Judiciary ought to defer to the State.

3 QUESTION: But maybe -- maybe, and I -- we've --  
4 we haven't said this -- maybe our assumption is that the  
5 State, in establishing a penal system, is going to  
6 establish it on a set of consistent and neutral principles  
7 from beginning to end. Would that be a legitimate basis  
8 for us to ground our constitutional analysis?

9 MR. DE NICOLA: No, Your Honor. It disables the  
10 states from changing -- from dealing with changing  
11 conditions.

12 QUESTION: Thank you, Mr. De Nicola.

13 Mr. Chertoff, we'll hear from you.

14 ORAL ARGUMENT OF MICHAEL CHERTOFF

15 ON BEHALF OF THE RESPONDENT

16 MR. CHERTOFF: Mr. Chief Justice, and may it  
17 please the Court: I think the last series of questions  
18 which Justice Souter posed to Mr. De Nicola really framed  
19 the issue in light of this case's most recent  
20 pronouncement in Harmelin -- this Court's most recent  
21 pronouncement in Harmelin.

22 I would have read Harmelin as establishing two  
23 principles, at a minimum. One is, the analysis is not  
24 proportionality; it's gross disproportionality, an  
25 extremely rare basis to invalidate a statute. Second, we



1 recognize that the states are entitled to adopt different  
2 penological theories, or a mix of theories. In fact, I  
3 would have thought that a state's entitled to say, for  
4 example, that certain types of crimes ought to be  
5 addressed in terms of retribution; other types of crimes  
6 posing other kinds of issues can be dealt with in terms of  
7 deterrence and incapacitation.

8 And if the consequence of that principle is that  
9 this Court has very limited review on comparability of  
10 sentences, at least where we are dealing with sentences  
11 that allow for the possibility of parole, then I think the  
12 conclusion is that it is the extremely rare case in which  
13 a sentence gets --

14 QUESTION: Well, why isn't that this case? I  
15 mean, I don't know how to approach proportionality other  
16 than to say, What sentences are given for the same crime,  
17 or what crimes are treated with the same sentence?

18 Now, suppose, looking at that, I find this is  
19 the rare case. If it isn't, why isn't it? I mean, all  
20 the information we have, as I've said before, seems to  
21 suggest that this is higher by a factor of two or three  
22 times anything else you can find.

23 MR. CHERTOFF: Well --

24 QUESTION: Now, if that isn't grossly  
25 disproportionate, why isn't it?

1           MR. CHERTOFF: It's not for several reasons,  
2 Your Honor. First of all, although there's nothing in the  
3 record to speak to what the pre-1977 proportions were in  
4 terms of sentencing, we do know, for example, that  
5 elsewhere in the country there have been comparable  
6 sentences. We've cited in the United States --

7           QUESTION: Cited a lot of instances in which the  
8 law permits such a sentence, but that's quite different  
9 from saying there was such a sentence.

10          MR. CHERTOFF: Actually, I think in footnote 13,  
11 we've cited several cases in other states where you have  
12 very comparable punishments, where you have larcenies  
13 between 4- and \$700 as the third strike --

14          QUESTION: And do you have instances where  
15 people were sentenced to 25 real years in prison for  
16 having committed such an offense? Or were you citing that  
17 the law would permit such a sentence?

18          MR. CHERTOFF: We cited review and rejection of  
19 disproportionality challenges in one case in Nevada to a  
20 life sentence without parole for a grand larceny of --

21          QUESTION: Good, okay, thank you.

22          MR. CHERTOFF: -- \$476, and a similar one, I  
23 think, in South Dakota.

24          Also, of course, as we look at the current  
25 sentencing regime, this is not, as in Solem versus Helm,

1 where you have single judge who is apparently an outlier  
2 under the state sentencing scheme. In this case, if one  
3 takes, in fact, a petitioner's own figures, you have at  
4 least 2- to 300 individuals whose third strike, under the  
5 California scheme as it now exists, has, in fact, been a  
6 property-based crime.

7 And I think the most compelling reason why this  
8 is not that very, very rare case where we strike down a  
9 sentence is precisely what Justice Ginsburg has been  
10 repeatedly asking about, the discretion that the courts  
11 have to tailor the particular sentence in this case to the  
12 facts of the case. If we look at the record in this case,  
13 in the joint appendix, the sentencing judge carefully  
14 considered the entirety of the file with respect to the  
15 trigger -- or the predicate offenses, which involved,  
16 actually, three burglaries in the course of a single  
17 month, one of which involved pulling a knife and  
18 threatening somebody, as well as at least nine prior  
19 offenses.

20 And interestingly, in no case since 1988 had the  
21 petitioner ever successfully completed probation or  
22 parole. He was always violating probation or parole by  
23 committing his next offense. And that's precisely what  
24 the sentencing judge looked at and explicitly referred to  
25 in rejecting the request on the part of the petitioner

1     either to downgrade the triggering offense to a  
2     misdemeanor, or to eliminate some of the strikes.

3             And I would have thought that is precisely what  
4     we expect and want judges to do in a rational sentencing  
5     system

6             QUESTION: In effect, you're -- going back to  
7     the beginning of your argument, I think you're -- I think  
8     you're saying that what the judge here did in rejecting  
9     the request to downgrade or to disregard, in effect, was  
10    saying, "Yes, I am finding that this is a case in which it  
11    is appropriate to sentence on an entirely different  
12    theory, a theory of putting them away, as opposed to a  
13    theory of deterrence," and I -- that seems to be the logic  
14    of what's going on.

15            MR. CHERTOFF: That's correct; an entirely  
16    different theory, though, that is embraced by the State in  
17    passing this law.

18            QUESTION: And may I ask you one more question  
19    on that? Because again, you started toward it in  
20    responding to me at the beginning. Like you, I came in  
21    here assuming that the State could change its theories.  
22    If that is so, then I guess what that means for  
23    proportionate or gross disproportionality analysis is  
24    this: A State can do it and can pass our Eight Amendment  
25    test if it has a reasonable basis for saying, "We are

1 going, under certain circumstances, to say there is a  
2 change to theory of sentencing. The theory changes from  
3 deterrence or mere retribution to a theory of public  
4 protection, putting away the person who simply will repeat  
5 and repeat and repeat. "

6 So, for purposes of our proportionality  
7 analysis, the question would come down, Do they have a  
8 reasonable basis for doing that under their statute, in  
9 general? And in particular, is there a reasonable basis  
10 for saying that this is a case for that? And if the  
11 answers to those two questions are yes, then it passes the  
12 test. Is that -- would you adopt that analysis?

13 MR. CHERTOFF: I would absolutely agree that if  
14 it satisfies those two, it passes the test. That's not to  
15 say that if it flunks those, it automatically fails the  
16 test. But certainly if you meet those conditions, I think  
17 you pass the test. And I think there's a common sense to  
18 that.

19 One could look, for example, at certain types of  
20 violent crimes, like murders and rapes and say,  
21 irrespective of whether it was a crime of passion or  
22 something that will never happen again, "It is so heinous,  
23 our philosophy is we have to punish it." But one can also  
24 look at comparatively small crimes, at least if they're  
25 felonies, and say, "If someone is repetitiously unable to

1 conform their conduct to the requirements of the law, we  
2 don't have to wait until he commits the next felony or the  
3 next two felonies before we put an end to it."

4 And interestingly, if one goes back Blackstone,  
5 who talks a little bit about the issue of proportionality  
6 as it related back in his day, he discusses the fact that  
7 when you deal with habitual offenders, it would be cruel  
8 to the public to simply allow that person to get out again  
9 and commit their next crime.

10 So, I don't know that it's so much that the  
11 State changes its theory, as that the State adapts its  
12 theory to the particular type of crime and particular type  
13 offender. And that's, of course, what we want to have in  
14 sentencing.

15 And, finally, I would say this. In a scheme  
16 like California, where the state judge has the power to  
17 tailor to the particular offender and the particular  
18 offense what the right answer is, for the federal courts  
19 to come in under gross disproportionality analysis and  
20 recalibrate that -- even if, sitting as state trial  
21 judges, the justices might feel we would do it  
22 differently -- would be essentially converting the courts  
23 into a constitutional sentencing commission. And if one  
24 looks at the companion case --

25 QUESTION: Excuse me, would be essentially

1 to --

2 MR. CHERTOFF: Convert the court into a  
3 constitutional sentencing commission. Doing the kind of  
4 analysis that we now have, a sentencing commission --

5 QUESTION: And that would be a very bad thing.  
6 I agree.

7 (Laughter.)

8 MR. CHERTOFF: It would be a -- certainly very  
9 complicated thing, Justice Breyer.

10 So -- and if one looks at the companion case,  
11 Andrade, and the subsequent cases in the Ninth Circuit  
12 that have flowed from that case, one sees this phenomenon  
13 beginning to emerge, where every fact pattern is evaluated  
14 slightly differently. One court views burglary as being a  
15 violent offense; one court says it's not a violent  
16 offense.

17 QUESTION: Could you argue that, because  
18 discretion is consistent with the goals of the statute  
19 before the sentencing, that some discretion is also  
20 permitted to a reviewing court after the sentencing, and  
21 they can still maintain the symmetry and the purpose of  
22 the statute?

23 MR. CHERTOFF: The state law could certainly  
24 provide for some kind of review as a matter of state  
25 sentencing law in terms of abuse of discretion by the

1 sentencing judge.

2 QUESTION: But in this -- in California, does  
3 the appellate court ever set aside sentences on the ground  
4 there was an abuse of discretion to invoke the three  
5 strikes law?

6 MR. CHERTOFF: I know of cases where they have  
7 affirmed trial judges that have set aside strikes. I  
8 don't know of a case --

9 QUESTION: No, I -- has -- has a trial judge  
10 ever been set aside for imposing the third strike?

11 MR. CHERTOFF: I'm not aware of it.

12 QUESTION: I don't think --

13 MR. CHERTOFF: I'm not aware --

14 QUESTION: -- there are any --

15 MR. CHERTOFF: -- of such a case. Certainly the  
16 state law could allow that to happen.

17 If there are no further questions, I will return  
18 the rest of my time to the Court.

19 QUESTION: Thank you, Mr. Chertoff.

20 Mr. Denvir, you have one minute remaining.

21 REBUTTAL ARGUMENT OF QUIN DENVIR

22 ON BEHALF OF THE PETITIONER

23 MR. DENVIR: Your Honor, the point I -- I'd like  
24 to make two points. One is, if the discretion in -- under  
25 the California law is very limited. One thing would be to



1 treat a wobbler, if it is a wobbler, and reduce it to a  
2 misdemeanor; so you would go from 25 to life, or life, to  
3 one-year maximum penalty. That's not used very often.  
4 The other one is to strike a prior conviction. But that's  
5 a -- the California Supreme Court in Romero said that's a  
6 very limited discretion, that it is only when you can find  
7 that this offender is outside the "spirit of the law,"  
8 whatever that is. And there's an amicus brief filed by  
9 the Los Angeles public defender in Romero that shows that  
10 that discretion has been used very little in California.  
11 So the -- this limited discretion has no effect on it.

12 The only other point I'd make, as far as the  
13 repetition -- as far as the labeling, if all the  
14 legislature has to do is say, "What we're doing here is  
15 incapacitation, and, therefore, the Court can't look at  
16 that," then it really writes the Eighth Amendment  
17 protections against grossly disproportional sentences out  
18 totally. If it's just a question of -- they say, "Here's  
19 our reason," and you can't even question that, because  
20 they can always claim they want to incapacitate any  
21 criminal for any amount of time.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Denvir.  
23 The case is submitted.

24 (Whereupon, at 11:09 a.m., the case in the  
25 above-entitled matter was submitted.)